84-1733

Office-Supreme Court, U.
FILED
MAY 3 1985
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

IN re DANIEL R. DE NARDO

PETITION FOR A WRIT OF COMMON LAW

CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO
P.O. BOX 100682
ANCHORAGE, ALASKA
99510

60 pp

NO.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

IN re DANIEL R. DE NARDO

PETITION FOR A WRIT OF COMMON LAW

CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO
P.O. BOX 100682
ANCHORAGE, ALASKA
99510

QUESTION PRESENTED

A COURT ACTING CONTRARY TO ALL THE EVIDENCE OF RECORD TO DENY TRIAL BY JURY, ACTS BEYOND THE JURISDICTIONAL LIMITATIONS OF THE FIFTH AND SEVENTH AMENDMENTS AND IS SUBJECT TO THE EXTRAORDINARY POWER OF THE UNITED STATES SUPREME COURT UNDER COMMON LAW CERTIORARI.

PARTIES

Daniel R. DeNardo-Plaintiff and appellant, at the time of this action a permanent Alaska State employee working as a petroleum auditor in the Department of Revenue.

Thomas K. Williams-Defendant and appellee, at the time of this action he was Mr. DeNardo's supervisor as director of the Petroleum Revenue Division.

State of Alaska-Mr. DeNardo's employer.

Judge Browning-Chief Judge Ninth Circuit

Judge Wallace-Cirtuit Judge Ninth Circuit

Judge Poole-Circuit Judge Ninth Circuit

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES.....	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	2
STATEMENT OF JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	6
STATEMENT OF THE CASE.....	10
REASONS FOR GRANTING THE WRIT...	16
I. DENIAL OF TRIAL BY JURY BY PRE-TRIAL ORDER IS JURISDICTIONALLY VOID...	16
II. THE NINTH CIRCUIT'S REFUSAL TO ADDRESS THE MERITS OF A RULE 41(B) DISMISSAL UNDER PROCTOR & GAMBLE V. U.S., 356 U.S. 677, DENIES DUE PROCESS AND TRIAL BY JURY	17
III. THE NINTH CIRCUIT'S FINDING THAT "JUST CAUSE" IS NOT REQUIRED IS REFUTED BY THE COLLECTIVE LABOR AGREEMENT.....	19

Page

IV. MR. DE NARDO'S PERMDNENT EMPLOYMENT STATUS IS JUDICIALLY ADMITTED IN CASE NO. 85-3745 PENDING IN THE NINTH CIRCUIT..... 20

V. THE NINTH CIRCUIT'S FINDING THAT THERE WAS NO EXERCISE OF FREE SPEECH IS REFUTED BY UNCONTESTED FACTS AND THE UNAPPEALED FINDING OF THE DISTRICT COURT..... 21

VI. DEFENDANTS' ADMISSIONS AND THE UNCONTESTED FACTS UNDER THE OBJECTIVE IMMUNITY TEST, REJECT THE NINTH CIRCUIT'S FINDING OF ABSOLUTE IMMUNITY..... 22

VII. THE NINTH CIRCUIT INCORRECTLY APPLIES STATE LAW TO ADMITTED FACTS OF FOURTH AMENDMENT VIOLATION OF WARRANTLESS SEARCH AND SEIZURE..... 23

CONCLUSION..... 26

TABLE OF AUTHORITIES

CASES

	Page
Creswill v. Pythias of Georgia, 225 U.S. 246	3
Chastleton Corp. v. Sinclair, 264 U.S. 543	5
Chicago Junction Case, 264 U.S. 258	4
Cleveland Board of Education v. Loudermill, 53 U.S.L.W. 4306	20
Colgrove v. Battin, 413 U.S. 149	6
Crowell v. Benson, 285 U.S. 22	3
Curtis v. Loether, 415 U.S. 189	5
Fiske v. Kansas, 274 U.S. 380	3
G.M. Leasing v. U.S., 429 U.S. 338	24
Harlow v. Fitzgerald, 102 S.Ct. 2727	23
Hoffa v. U.S., 385 U.S. 293	24
Hovey v. Elliott, 167 U.S. 409	3
ICC v. Louisville & Nashville Ry., 227 U.S. 88	4
Mancusi v. De Forte, 392 U.S. 364	24
Patsy v. University of Florida, 457 U.S. 496	21
Preston v. U.S., 376 U.S. 364	24

Page

St. Joseph Stockyards v. U.S., 298 U.S. 38..... 3

Sibron v. New York, 392 U.S. 40.. 24

Thompson v. Louisville, 362 U.S 199..... 4

U.S. Alkali Export Assn. v. U.S., 325 U.S. 196..... 2

U.S. v. Carolene Prod., 304 U.S. 144..... 5

Alaska Cases

J.M.A. v. State, 542 P.2d 170.... 25

Whaley v. State, 438 U.S. 718.... 20

Federal Cases

Bass v. Hoagland, 172 F.2d 205, cert. den. 338 U.S. 816..... 4,18

Gillard v. Schmidt, 579 F.2d 825 (3rd Cir)..... 24

U.S. v. Blok, 188 F.2d 1019(Dist. Columbia)..... 25

U.S. v. Haggerty, 388 F.2d 713 (7th Cir.)..... 25

U.S. v. Kahan, 350 F.Supp. 784 (S.D.N.Y.)..... 25

U.S. v. Nasser, 476 F.2d 1111 (7th Cir.)..... 25

CONSTITUTIONAL PROVISIONS

	Page
Fifth Amendment.....	3-5
Seventh Amendment.....	5-6 16-18

STATUTES

28 U.S.C. §1651.....	2

ALASKA STATUTES AND REGULATIONS

AS 18.50.320.....	15
7 AAC 05.925.....	15

COLLECTIVE BARGAINING AGREEMENT

Art. 34.....	19
Art. 5.....	19
Art. 1.....	19

UNITED STATES DISTRICT

ss.

DISTRICT OF ALASKA

I, DANIEL R. DE NARDO, BEING DULY SWORN, HEREBY STATE AND INCORPORATE AS TRUE THE STATEMENTS HEREIN AND THE ATTACHED APPENDIX.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

IN re DANIEL R. DE NARDO

PETITION FOR A WRIT OF COMMON LAW

CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner, DANIEL R. DE NARDO, respectfully urges that a Writ of Common Law Certiorari issue to correct the jurisdictional violation of the Ninth Circuit Court of Appeals denying Due Process and Trial by Jury.

OPINIONS BELOW

The Ninth Circuit affirmed the district court decision 29 November, 1984 (App.15-17), granted Rehearing 20 February, 1985, and affirmed by opinion 20 February,1985. (App. 3-14) Rehearing was denied 2 April, 1985. (App.1-2)

JURISDICTION

COMMON LAW CERTIORARI

Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1651 and Art. III of the United States Constitution.

The office of Common Law Certiorari is to enforce jurisdictional limitations on inferior courts. United States Alkali Export Assn. v. United States, 325 U.S. 196,202-203.

The Ninth Circuit has violated the jurisdictional limitations of the Fifth and Seventh Amendments in an action at law under 42 U.S.C. §1983 and 28 U.S.C. 1343.

I. NINTH CIRCUIT'S DECISION IS VOID UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT; THE CONSTITUTIONAL FACT IS THAT THE DECISION IS NOT BASED ON ANY EVIDENCE IN THE RECORD

The doctrine of Constitutional Fact is the doctrine of jurisdictional fact in a special form. The Constitutional Fact question arises where the fundamental or jurisdictional determinations of fact revolve around the observance of Constitutional restrictions in actions brought to enforce Constitutional rights. Crowell v. Benson, 285 U.S. 22; Fiske v. Kansas, 274 U.S. 380,385-386; Creswill v. Pythias of Georgia, 225 U.S. 246,261; St. Joseph Stockyards v. United States, 298 U.S. 38,49-53.

The Constitutional Due Process restrictions on the federal courts is the right to be heard on the evidence. Hovey v. Elliott, 167 U.S. 409,417. The Federal Rules of Evidence were enacted into law by Congress and were made to

apply to the United States district and appellate courts. Public Law 93-595; Fed. R. Evid. 1101.

Mr. DeNardo's evidence on the record is undisputed admissions. Mr. DeNardo's Statement of the Case must be taken as admitted in this Writ. Chicago Junction Case, 264 U.S. 258,262. The district and appeals courts' orders are unsupported by any evidence in the record. The due process clause of the Fifth Amendment acts as a check upon federal power to reach a valid judgment. Orders unsupported by any evidence on the record are void as beyond the jurisdiction of the tribunal. ICC v. Louisville and Nashville Ry., 227 U.S. 88,91-92; Bass v. Hoagland, 172 F.2d 205,209-210, cert. den. 338 U.S. 816.

> "Conviction upon a charge not made would be sheer denial of due process, so is it a violation of due process to convict or punish a man without evidence of his guilt."

Thompson v. Louisville, 362 U.S. 199-206.

The Ninth Circuit's decision upholding the unconstitutional acts of the district court is void because it denies due process. The Circuit's decision is contrary to every fact in the record. The validity of the application of any law depends upon the truth of the facts declared. Chastleton Corp. v. Sinclair, 264 U.S. 543, 547; United States v. Carolene Prod., 304 U.S. 144, 153-154.

II. DENIAL OF THE RIGHT TO TRIAL BY JURY IS A VOID ACT BEYOND THE COURT'S JURISDICTION

42 U.S.C. §1983 states, "[s]hall be liable to the injured party in an action at law, ..." The Supreme Court has determined that the Seventh Amendment applies to actions enforcing statutory rights; if the statute creates legal remedies enforceable in an action for damages in courts of law. Curtis V. Loether, 415 U.S. 189, 193-194.

> "The statute, 28 U.S.C. §2072, authorizes this Court to promulgate the Federal Rules of Civil Procedure but provides that, "[s]uch rules ... shall preserve the right of trial by jury as a common law and as declared by the Seventh Amendment to the Constitution."

Colgrove v. Battin, 413 U.S. 149,161.

The district court's pre-trial order denying the right to trial by jury and the appeals court's affirmance are Constitutionally void.

The Supreme Court has jurisdiction under 28 U.S.C. §1651 and Art. III of the Constitution to enforce the jurisdictional limitations of the Fifth and Seventh Amendments on the district and appeals courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall ... be deprived of life, liberty, or property, without due process of law;

SEVENTH AMENDMENT

In suits at common law, where the value in congroversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ...

28 U.S.C. §1651

WRITS (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

ALASKA STATUTES AND REGULATIONS

AS 18.50.320 Copies of data from vital records. (2) A certified copy of a certificate or a part of it issued in accordance with (1) of this section is considered the original for all purposes and is prima facie evidence of the facts stated, ...

7 AAC 05.925. LIMITED DISCLOSURE

Such inspection, disclosure, or copy shall be permissible subsequent to the filing of any vital statistics record only when the custodian of the original or copy of such record receives application therefor; and is satisfied that such applicant has a direct interest in the matter recorded, and that the information therein contained isnecessary for the determination of personal or property rights. Such dicisions of a local registrar, recorder, or other local custodian of a vital record may be appealed to the State Registrar. The decision of the State Registrar shall be final, subject only to appeal to the superior court.

COLLECTIVE LABOR AGREEMENT

Art. 1 §2(k)- "Just Cause." Just cause means, but is not limited to: incompetence, unsatisfactory performance of duteis, unexecused absenteeism, drunkeness,

dishonesty and gross disobedience.

Art. 5(c)- reduce the work force due to lack of work, funding or other cause consistent with efficient management; discipline, suspend, demote or dismiss employees for just cause.

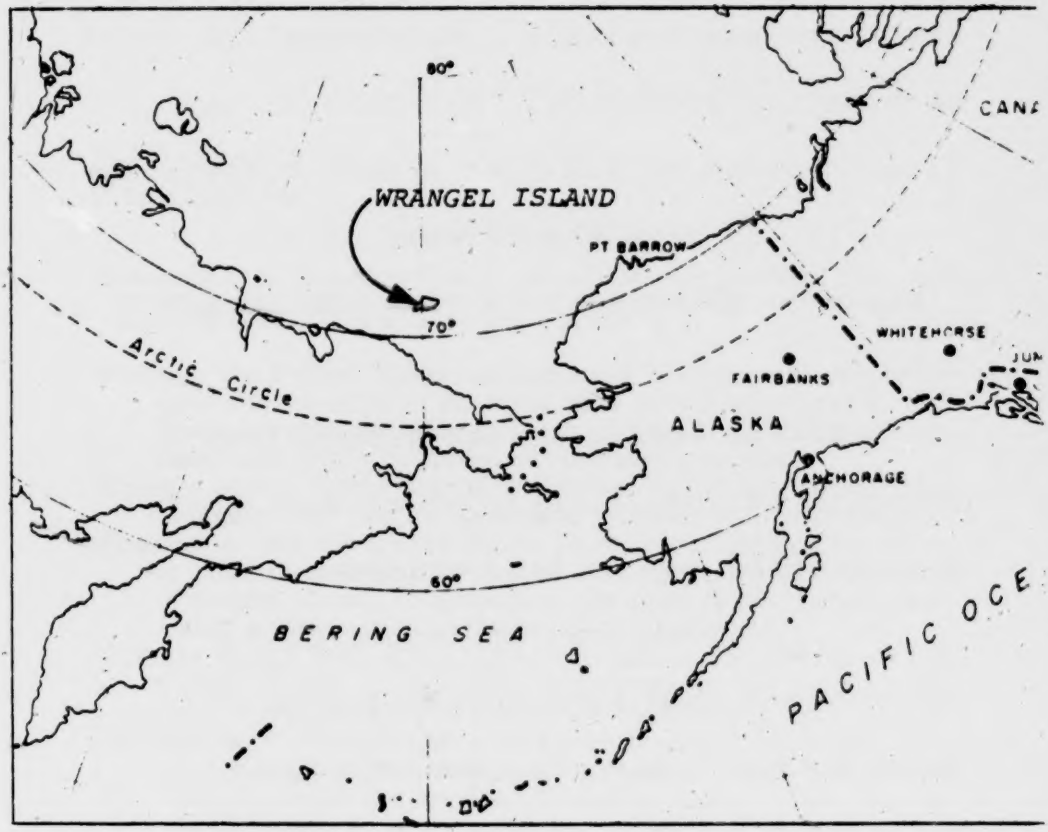
Art. 34- If there is any conflict between the terms of the Agreement and any Personnel memoranda or rules of the merit systen, the terms of this Agreement shall supersede those momoranda or rules in their application to the unit.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RAOUL WALLENBERG

AUGUST 4, 1912-



WRANGELL ISLAND, ALASKA

STATEMENT OF THE CASE

Mr. DeNardo was fired from permanent state employment protected by a collective labor agreement with a "just cause" termination provision. Mr. DeNardo was fired because of his free speech activities:

1) to gain the release of U.S. citizen Raoul Wallenberg from the Soviet Union

2) to remove Soviet troops from Wrangell Island, Alaska; where Wallenberg was an still may be held prisoner

3) for testimony solicited by a legislative committee investigating fraud by Mr. DeNardo's supervisors and defendants in this action. [R.82,p.2-3, R.66,p.2; R.48,Ex.B 4-5]

Defendant Williams admits in his affidavit to conversations with Mr. DeNardo about the Soviet occupation of Wrangell Island and Mr. DeNardo's activities to gain the release of Raoul Wallenberg.

[R.66,Ex.A-1 & 21 of 23]

I am honored to have the Congress and President of the United States introduce Raoul Wallenberg:

Public Law 97-54
97th Congress

Joint Resolution

Proclaiming Raoul Wallenberg to be an honorary citizen of the United States, and requesting the President to ascertain from the Soviet Union the whereabouts of Raoul Wallenberg and to secure his return to freedom.

Whereas the United States has conferred honorary citizenship on only one occasion in its more than two hundred years, and honorary citizenship is and should remain an extraordinary honor not lightly conferred nor frequently granted;

Whereas during World War II the United States was at war with Hungary, and had no diplomatic relations with that country;

Whereas in 1944 the United States Government through Secretary of State Cordell Hull requested the cooperation of Sweden, as a neutral nation, in protecting the lives of Hungarian Jews facing extermination at the hands of the Nazis;

Whereas Raoul Wallenberg agreed to act at the behest of the United States in Hungary, and went to Hungary in the summer of 1944 as Secretary of the Swedish Legation;

Whereas Raoul Wallenberg, with extraordinary courage and with total disregard for the constant danger to himself, saved the lives of almost one hundred thousand innocent men, women, and children;

Whereas Raoul Wallenberg, with funds and directives supplied by the United States, provided food, shelter, and medical care to those whom he had rescued;

Whereas the Soviet Union, in violation of Wallenberg's Swedish diplomatic immunity and of international law, seized him on January 17, 1945, with no explanation ever given for his detention and subsequent imprisonment;

Whereas Raoul Wallenberg has been a prisoner in the Soviet Union since 1945;

Whereas reports from former prisoners in the Soviet Union, as recent as January 1981, suggest that Raoul Wallenberg is alive;

Whereas history has revealed that heroic acts of salvation were tragically rare during the massacre of millions of innocent human beings during World War II; and

Whereas the significance of this symbol of man's concern for his fellow man has been tainted by the wall of silence that surrounds the fate of Wallenberg: Now, therefore, be it

STATEMENT OF THE CASE

Mr. DeNardo was fired from permanent state employment protected by a collective labor agreement with a "just cause" termination provision. Mr. DeNardo was fired because of his free speech activities:

1) to gain the release of U.S. citizen Raoul Wallenberg from the Soviet Union

2) to remove Soviet troops from Wrangell Island, Alaska; where Wallenberg was an still may be held prisoner

3) for testimony solicited by a legislative committee investigating fraud by Mr. DeNardo's supervisors and defendants in this action. [R.82,p.2-3, R.66,p.2; R.48,Ex.B 4-5]

Defendant Williams admits in his affidavit to conversations with Mr. DeNardo about the Soviet occupation of Wrangell Island and Mr. DeNardo's activities to gain the release of Raoul Wallenberg.

[R.66,Ex.A-1 & 21 of 23]

I am honored to have the Congress and President of the United States introduce Raoul Wallenberg:

PUBLIC LAW 97-54—OCT. 5, 1981

Public Law 97-54
97th Congress

Joint Resolution

Proclaiming Raoul Wallenberg to be an honorary citizen of the United States, and requesting the President to ascertain from the Soviet Union the whereabouts of Raoul Wallenberg and to secure his return to freedom.

Whereas the United States has conferred honorary citizenship on only one occasion in its more than two hundred years, and honorary citizenship is and should remain an extraordinary honor not lightly conferred nor frequently granted;

Whereas during World War II the United States was at war with Hungary, and had no diplomatic relations with that country;

Whereas in 1944 the United States Government through Secretary of State Cordell Hull requested the cooperation of Sweden, as a neutral nation, in protecting the lives of Hungarian Jews facing extermination at the hands of the Nazis;

Whereas Raoul Wallenberg agreed to act at the behest of the United States in Hungary, and went to Hungary in the summer of 1944 as Secretary of the Swedish Legation;

Whereas Raoul Wallenberg, with extraordinary courage and with total disregard for the constant danger to himself, saved the lives of almost one hundred thousand innocent men, women, and children;

Whereas Raoul Wallenberg, with funds and directives supplied by the United States, provided food, shelter, and medical care to those whom he had rescued;

Whereas the Soviet Union, in violation of Wallenberg's Swedish diplomatic immunity and of international law, seized him on January 17, 1945, with no explanation ever given for his detention and subsequent imprisonment;

Whereas Raoul Wallenberg has been a prisoner in the Soviet Union since 1945;

Whereas reports from former prisoners in the Soviet Union, as recent as January 1981, suggest that Raoul Wallenberg is alive;

Whereas history has revealed that heroic acts of salvation were tragically rare during the massacre of millions of innocent human beings during World War II; and

Whereas the significance of this symbol of man's concern for his fellow man has been tainted by the wall of silence that surrounds the fate of Wallenberg: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Raoul Wallenberg is proclaimed to be an honorary citizen of the United States of America.

SEC. 2. The President is requested to take all possible steps to ascertain from the Soviet Union the whereabouts of Raoul Wallenberg and to secure his return to freedom.

Approved October 5, 1981.

Legislation Conferring Honorary U.S. Citizenship on Raoul Wallenberg

Remarks on Signing S.J. Res. 65 Into Law. October 5, 1981

Not only a distinguished gathering here on the platform, but a distinguished audience out here. Today we're here for—I'm signing the bill to make Raoul Wallenberg an honorary citizen of the United States. But in making him a United States citizen, I think we're the ones that are being honored.

Raoul Wallenberg is the Swedish savior of almost 100,000 Jewish men, women, and children. What he did, what he accomplished was of biblical proportions. Sir Winston Churchill, another man of force and fortitude, is the only other person who has received honorary United States citizenship. And as John F. Kennedy said at that signing ceremony, "Indifferent himself to danger, he wept over the sorrows of others."

That compassion also exemplifies the man we are gathered here for today. In 1944 the United States requested Sweden's cooperation in protecting the lives of Hungarian Jews facing extermination at the hands of the Nazis. In the months that followed, the United States supplied the funds and the directives, and Raoul Wallenberg supplied the courage and the passion. How can we comprehend the moral worth of a man who saved tens and tens of thousands of lives, including those of Congressman and Mrs. Lantos?

In 1945, in violation of diplomatic immunity and international law, he was seized by the Soviet Union. The Nazis were gone, and the Soviets had come in as an ally. And yet today, there is evidence that he is still imprisoned by the Soviets. Wherever he is, his humanity burns like a torch.

I heard someone say that a man has made at least a start on understanding the meaning of human life when he plants shade trees under which he knows he will never sit. Raoul Wallenberg is just such a man. He nurtured the lives of those he never knew at the risk of his own. And then just recently, I was told that in a special area behind the Holocaust Memorial in Israel, Hungarian Jews now living in Sweden planted 10,000 trees in Raoul's honor.

Mrs. Lagergren, Mr. von Dardel, we're going to do everything in our power so that your brother can sit beneath the shade of those trees and enjoy the respect and love that so many hold for him.

Note: The President spoke at 2:35 p.m. at the signing ceremony in the Rose Garden at the White House. Participants in the ceremony included the Swedish Ambassdor and Mrs. Wilhelm Wachtmeister, Members of the Senate and House of Representatives, representatives of the Jewish community, and Mr. Wallenberg's sister and brother, Nina Lagergren and Guy von Dardel, who came from Sweden for the ceremony. Also in attendance were Representative Tom Lantos of California, main sponsor of the resolution in the House, and his wife. While a 16-year-old youth working for the Hungarian underground, Representative Lantos was saved in Budapest by Mr. Wallenberg.

As enacted, S.J. Res. 65 is Public Law 97-54, approved October 5.

Wrangelll Island, Alaska is located 85 Miles off the northeast coast of Siberia and 275 miles northwest of Cape Lisbourne, Alaska. Wrangell Island is owned by the Ralph Lomen estate of Seattle, Washington, and Mark Seidenberg of Washington D.C. Mr. DeNardo became a lease holder from Mr. Seidenberg for valuable consideration in February 1978. [R.66,para.14;R.48,Ex.B-1to3]

The history and legal status of Wrangell is treated in the California Western International Law Journal, vol. 11, Winter 1981 and the Journal of Nothern Studies, University of Saskatchewan, Winter 1981,[R.54], and other magazines and newspaper articles. [R.48,Ex.E-6]

Mr. DeNardo's Termination

Mr. DeNardo was fired from permanent state employment for receiving a copy of a public death certificate of one Della Nayakik.

The death certificate shows Della's birthplace as Wrangell Island, Alaska.

[R.82,Ex.B-7] Della, her parents, and the other members of the Lomen Trading Company, were forcibly removed from Wrangell by the Soviets in 1924 and taken captive to Vladivostok. Based on Della's birth on Wrangell, the U.S. Consulate in Manchuria issued passport documents in 1925 identifying Della as a U.S. citizen.

The death certificate along with thousands of other documents, is being used to prove the sovereignty of Alaska over Wrangell.

Vital Statistics statute AS 18.50.320(2) makes a certified copy of a death certificate evidence of the original. The registrar of Vital Statistics exercises final administrative authroity over disclosure of death certificates under 7 AAC 05.925. Vital Statistics registrar Joan Brooks granted Mr. DeNardo a certified copy of Della's certificate under legal authority of the State Attorney General in opinion J-66-163-80.

[R.43 and Exhibits]

Mr. DeNardo was fired 6 February, 1979 for receiving a copy of the death certificate. [R.2] On 13 February, 1979, defendant Williams admitted there had not been a violation of state statutes. [R.66,21 of 23] Mr. DeNardo's firing came eleven days after he had implicated Williams and others of fraud in the Department of Revenue. Mr. DeNardo had given public testimony before the legislative Blue Ribbon Commission on the Personnel Act. [R.43] The district court found the testimony to be protected by the First Amendment but denied a jury trial.

REASONS FOR GRANTING THE WRIT

I. DENIAL OF TRIAL BY JURY BY PRE-TRIAL ORDER IS JURISDICTIONALLY VOID

Mr. DeNardo demanded a jury trial in his complaint. [R.2] Jury trial was denied by pre-trial order. [R.98] The appeals court refused to address the issue

even though it was separately appealed in appellate case no. 83.3889. Mr. DeNardo has a right to a jury trial in an action under 42 U.S.C. §1983.

II. THE NINTH CIRCUIT'S REFUSAL TO ADDRESS THE MERITS OF A RULE 41(B) DISMISSAL UNDER UNITED STATES V. PROCTOR & GAMBLE, 356 U.S. 677, DENIES DUE PROCESS AND TRIAL BY JURY

Mr. DeNardo motioned for a Rule 41 (b) dismissal under Proctor & Gamble, because the district court denied the demand for jury trial. In its first memorandum decision the appeals court ruled that a Rule 41(b) dismissal under Proctor & Gamble does not bring up the merits of the dismissal.

> "In this appeal however, Mr. DeNardo does not contend that the district court erred by dismissing his complaint."

(App. 15-17)

The Petition for Rehearing pointed out that two separate appeals had been filed in this action, numbers 83-3827 and 83-3889. (App. 19-22)

83-3889 specifically appealed the Proctor & Gamble dismissal on the underlying issue of denial of jury trial. The court granted the Petition (App. 3-4) but still refused to address the jury issue. (App. 7)

The appellate court is estopped from denying review of the jury issue because it ordered the separate appeals consolidated after the defendants had represented that the Rule 41(b) dismissal had been fully briefed in Mr. DeNardo's opening brief. (App. 18)

The district court's order denying a jury trial is jurisdictionally void.

> "In Johnson v. Zerbst, the court was declared to have lost its jurisdiction in a trial for crime when it denied the constitutional right to the assistance of counsel. The right of jury trial, if not waived but denied after demand, the judge usurping the function fo the jury, would seem to be similarly an unconstitutional abusr of power."

Bass v. Hoagland, 172 F.2d 205,209(1949), cert den. 338 U.S. 816.

Mr. DeNardo's failure to attend the pre-trial conference and amend his complaint per the pre-trial order is irrelevant. The pre-trial order was jurisdictionally void.

III. THE NINTH CIRCUIT'S FINDING THAT "JUST CAUSE" IS NOT REQUIRED FOR TERMINATION IS REFUTED BY THE COLLECTIVE LABOR AGREEMENT

Mr. DeNardo was fired under the 1977-1979 state labor agreement. Art. 34 states that the agreement controls over state personnel rules contrary to the agreement. Art. 5(c) recognizes the authority of management to fire employees for "just cause" only. Art. 1(k) defines "just cause." [R.39,Ex.A-6,9,36 of 37]

Defendants admit the effect of a "just cause" requirement:

> "It is now well settled that public employees who can be dismissed from their position only for "just cause" or who have a contractual guarantee of continued employment have a property interest in continued employment."

[R.69,p.4]

Cleveland Board of Education v. Loudermill, 53 USLW 4306(1985), holds that a "just cause" requirement before termination is a Fourteenth Amendment property right subject to due process.

Whaley v. State, 438 P.2d 718 (Alaska 1968), cited by the appeals court is irrelevant. That case is a 1968 case and the statute granting collective bargaining became law in 1972 under AS 23.40, Art. 2.

IV. MR. DE NARDO'S PERMANENT EMPLOYMENT STATUS IS JUDICIALLY ADMITTED IN CASE NO. 85-3745 PENDING IN THE NINTH CIRCUIT

In the second Petition for Rehearing Mr. DeNardo requested the appeals court to judicially notice the admissions in case no. 83-3745, DeNardo v. Murphy and State. It is admitted that Mr. DeNardo was a permanent employee at the time he was fired in this action.

The appeals court states it does not have to decide the fact of Mr. DeNardo's permanent status because there was no "just cause" requirement. (App. 12)

The appeals court incorrectly states that Mr. DeNardo appealed the agency decision at issue in case no. 85-3745. (App. 11) It is admitted by the state in that case and so declared by the state court that the agency decision was void. The issue in that case is Mr. DeNardo's failure to appeal the void agency decision and therby exhaust his administrative remedy. The sole issue in 85-3745 is the holding of Patsy v. University of Florida, 457 U.S. 496.

V. THE NINTH CIRCUIT'S FINDING THAT THERE WAS NO EXERCISE OF FREE SPEECH IS REFUTED BY UNCONTESTED FACTS AND THE UNAPPEALED FINDING OF THE DISTRICT COURT

The appeals court found no free speech right in Mr. DeNardo's activities in acquiring a public record to support

his free speech activities related to Raoul Wallenberg and Wrangell Island.

The district court's unappealed finding of protected speech in Mr. DeNardo's legislative testimony is totally ignored by the Ninth Circuit. [R.93,pp.7-9]

The appeals court agrees that:

> "First Amendment protects an employee from discharge because of an employee's exercise of his free speech rights. Perry v. Sinderman, 408 U.S. 593,597-98."

(App. 9)

The facts compel the application of the First Amendment to this action.

VI. DEFENDANTS' ADMISSIONS AND THE UNCONTESTED FACTS UNDER THE OBJECTIVE IMMUNITY TEST, REJECT THE NINTH CIRCUIT'S FINDING OF ABSOLUTE IMMUNITY

The state attorney general and the state registrar of vital statistics ruled that Mr. DeNardo had a right to Della Nayakik's death certificate. Defendant Williams admits there had not been a violation of state statutes. (Statement of the Case)

Williams admits knowledge of Mr. DeNardo's Wallenberg and Wrangell Island activities through conversations with Mr. DeNardo. [R.66,Ex.A-1 & 21of 23] Mr. DeNardo's legislative testimony directly implicated Williams in wrongdoing and the district court granted trial to the court on the First Amendment violation of retaliatory discharge.

The evidence rejects the appeals court's application of the objective immunity test of Harlow v. Fitzgerald, 102 S.Ct. 2727,2740:

> "The standard would not allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of consitutional rights will not evade just punishment for his crimes."

VII. THE NINTH CIRCUIT INCORRECTLY APPLIES STATE LAW TO ADMITTED FACTS OF FOURTH AMENDMENT VIOLATION OF WARRANTLESS SEARCH AND SEIZURE

Defendants admit Mr. DeNardo's private office and personal desk were searched and his personal property seized. [R.39,p.10; R.69,p.12&14; R.66,Ex. A-8&11; R.19,Ex.A-1&2]

Regardless of state authority, when challenged on Fourth Amendment grounds the acts of state officers must be judged by federal standards. Preston v. U.S., 376 U.S. 364; Sibron v. New York, 392 U.S. 40,61.

Individuals are protected by the Fourth Amendment from warrantless government intrusion when they have a reasonable expectation of privacy in their offices. G.M. Leasing v. U.S., 429 U.S. 338,353; Mancusi v. Deforte, 392 U.S. 364,368-69; Hoffa v. U.S., 385 U.S. 293,301.

Public employees have a reasonable expectation of privacy in their personal desks and private offices. Gillard v.

Schmidt, 579 F.2d 825,827-29(3rd Cir. 1978); U.S. v. Nasser, 476 F.2d 1111, 1123(7th Cir. 1973); U.S. v. Kahan, 350 F.Supp.784, 790-98(S.D.N.Y. 1972); U.S. v. Hagarty, 388 F.2d 713,716-17(7th Cir. 1968); U.S. v. Blok, 188 F.2d 1019,1021(Dist.Col. Appeals 1951).

The appeals court cites J.M.A. v. State, 542 P.2d 170, for the proposition that the state of Alaska does not recognize a protected right against Fourth Amendment intrusions by state officers. That case is distinguishable on its facts. It involves state guardiansmip of a foster child under correctional statutes allowing official surveillance similar to that found in prisons. The guardian called police and authorized the seizure of marijuana in the guardian's residence.

CONCLUSION

Common Law Certiorari is addressed to jurisdictionally void acts of inferior courts. The Ninth Circuit's orders are jurisdictionally void under the Fifth And Seventh Amendments. It is a Constitutional Fact that the Ninth Circuit's orders are absolutely contrary to the facts evidenced in the record.

The United States Supreme Court should exercise its Constitutional authority over the Ninth Circuit by reversing its orders and ordering compliance with the jurisdictional requirements of the Fifth and Seventh Amendments.

RESPECTFULLY SUBMITTED this 1st day of May, 1985.

Daniel R. DeNardo

On this 1st day of May,1985, before me a Notary Public in and for the State of Alaska, duly commissioned and sworn, personally appeared Daniel R. DeNardo to me known to be the individual who executed the within and foregoing instrument, and acknowledged the said instrument to be his free and voluntary act and deed, for the uses and purposes herein mentioned.

GIVEN UNDER MY HAND AND SEAL this 1st day of May, 1985.

M. Sondra Adams

Notary Public in and for Alaska

My Commission expires: 10/30/85

APPENDIX

INDEX TO APPENDIX

	Page
DENIAL OF SECOND PETITION FOR REHEARING ISSUED 2 APRIL, 1985....	1-2
GRANT OF FIRST PETITION FOR REHEARING ISSUED 20 FEBRUARY, 1985	3-4
ORDER AND DECISION ISSUED 20 FEBRUARY, 1985.....	5-14
FIRST DECISION ISSUED 29 NOVEMBER, 1984.....	15-17
ORDER TO CONSOLIDATE APPEALS ISSUED 4 NOVEMBER, 1983.....	18
NOTICE OF APPEAL FILED 6 JUNE, 1983.....	19-20
NOTICE OF APPEAL FILED 9 MAY, 1983.....	21-22

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO,

Plaintiff-Appellant,

v

THOMAS K. WILLIAMS, et al.,

Defendants-Appellees.

DANIEL R. DENARDO

Plaintiff-Appellant,

vs

THOMAS K. WILLIAMS and JOHN DOES, INDIVIDUALS ACTING UNDER STATE LAW, STATE OF ALASKA.

Defendants- Appellees.

No. 83-3827
D.C. No. CV A81-038 JAV

No. 83-3889
D.C. No. CV 81-038

FILED APR. 2,1985

O R D E R

Appeal from the United States District Court for the District of Alaska

Before: BROWNING, Chief Judge, and WALLACE and POOLE, Circuit Judges

The petition for rehearing filed March 8, 1985 is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO,

Plaintiff-Appellant,

v

THOMAS K. WILLIAMS, et al.,

Defendants-Appellees.

DANIEL R. DENARDO

Plaintiff-Appellant,

vs

THOMAS K. WILLIAMS and JOHN DOES, INDIVIDUALS ACTING UNDER STATE LAW, STATE OF ALASKA.

Defendants- Appellees.

No. 83-3827
D.C. No. CV A81-038 JAV

No. 83-3889
D.C. No. CV 81-038

FILED FEB.20,1985

O R D E R

Appeal from the United States District Court for the District of Alaska

Before: BROWNING, Chief Judge, and WALLACE and POOLE, Circuit Judges

The petition for rehearing is granted.

The disposition filed November 29, 1984, is withdrawn, and attached disposition is substituted therefor.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO,

Plaintiff-Appellant,

v

THOMAS K. WILLIAMS, et al.,

Defendants-Appellees.

DANIEL R. DENARDO

Plaintiff-Appellant,

vs

THOMAS K. WILLIAMS and JOHN DOES, INDIVIDUALS ACTING UNDER STATE LAW, STATE OF ALASKA.

Defendants- Appellees.

No. 83-3827
D.C. No. CV A81-038 JAV

No. 83-3889 FILED FEB. 20,1985
D.C. No. CV 81-038

O R D E R

Appeal from the United States District Court for the District of Alaska
James A. von der Heydt, District Judge, Presiding
Submitted August 22, 1984*

Before: BROWNING, Chief Judge, and WALLACE and POOLE, Circuit Judges

De Nardo, a former tax auditor for the State of Alaska Petroleum Revenue Division, was fired in February 1979 because he improperly used his position to obtain a copy of a death certificate. He filed this action under 42 U.S.C. § 1983 against Williams as the Director of the Petroleum Revenue Division, the State of Alaska (Alaska), and unnamed defendants "acting under state law." De Nardo alleged that his constitutional rights under the first, fourth, and fourteenth amendments were violated by his dismissal and by the removal of his personal effects from his locked desk drawer. De Nardo sought compensatory damages from Alaska, compensatory and punitive damages from Williams and from the unnamed defendants, and requested a jury

trial. The district court issued several, nonfinal partial summary judgments, and eventually dismissed De Nardo's claim with prejudice. We affirm.

The district court dismissed De Nardo's complaint for failure to comply with the court's order that he file an amended complaint within ten days, and for failure to attend a preliminary pretrial conference. In this appeal, however, De Nardo does not contend that the district court erred by dismissing his complaint. Thus, De Nardo is barred from seeking reversal of the dismissal. Although Williams and Alaska contend that De Nardo is not entitled to raise the nonfinal orders on appeal because he invited dismissal, we disagree. The dismissal of a complaint with prejudice permits all prior, nonfinal orders to be reviewed. See,

e.g., Lojek v. Thomas, 716 F.2d 675,676 n.1 (9th Cir. 1983); Munoz v. Small Business Administration, 644 F. 2d 1361, 1364 (9th Cir. 1981).

A grant of summary judgment should be upheld if, viewing the evidence in the light most favorable to the party against whom summary judgment is granted, we determine that there was no genuine issue of material fact, and if the moving party was entitled to judgment as a matter of law. See, e.g., Compton v Ide, 732 F.2d 1429 (9th Cir. 1984).

De Nardo first contends that the district court erred by granting summary judgment for Alaska on the damages claims on the basis of eleventh amendment immunity. We disagree. Under the eleventh amendment, states that have not consented to suit are immune from section 1983 suits in federal court when

the relief sought is a retroactive award. See Quern v. Jordan, 440 U.S. 332, 337-38 (1979).

De Nardo next contends that his discharge violated his first amendment rights. The first amendment protects an employee from discharge because of the employee's exercise of his free speech rights. See, e.g., Perry v Sindermann, 408 U.S. 593, 597-98 (1972); McKinley v City of Eloy, 705 F2d 1110, 1113 (9th Cir. 1983). De Nardo failed to show, however, how the acquisition of the death certificate for his stated purpose of asserting his own property rights in Wrangell Island is a protected free speech right. Thus, summary judgment was properly granted.

The district court denied De Nardo's motion to amend his complaint to add factual allegations concerning the death certificate because De Nardo

attempted to realleqe the same first amendment claim disposes of by summary judgment. Since the new allegations also failed to show a protected constitutional interest, the district court did not abuse its discretion by denying leave to amend.

De Nardo also contends that the removal of his personal effects from his locked desk drawer violated the fourth amendment. Williams and the unnamed defendants allegedly removed De Nardo's personal effects from his locked desk drawer, and gave them to De Nardo in a box. Government officials performing discretionary functions are entitled to immunity if their conduct does not violate clearly established law at the time the action occurred. See Harlow v Fitzgerald, 457 U.S. 800, 818-819 (1982) (Harlow). Alaska law at the time of this event suggested that William's

action was legal. Cf. J.M.A. v State, 542 P.2d 170, 174 (Alaska 1975) (search of foster child's room by foster parent did not violate fourth amendment). Thus, Williams was entitled to qualified immunity, and partial summary judgment was properly granted.

De Nardo next contends that when he was discharged he was a permanent employee, and entitled to procedural due process under the fourteenth amendment. De Nardo, however, was previously discharged. The State of Alaska Labor Relations Agency (Agency) concluded that De Nardo's first discharge was for cause, and that his rehire pending the Agency's decision was as a new employee. De Nardo contends that his appeal of the Agency's decision precludes a finding that he was a probationary status employee.

We need not decide that issue,

however, because Williams is entitled to qualified immunity under Harlow. Probationary status employees in Alaska may be dismissed without a hearing. See Whaley v State, 438 P.2d 718, 723 (Alaska 1968); Personnel Rule 6 04.1. Williams reasonably relied on the Agency's finding that De Nardo was rehired as a new employee, and thus reasonably concluded that De Nardo was a probationary employee not entitled to a hearing. De Nardo did not attempt to challenge the Agency's decision until after the discharge occurred. Thus, Williams, in his decision not to hold a hearing, was entitled to qualified immunity.

De Nardo also contends that the district court erred by denying his motion to amend the complaint to add other government officials as defendants. Since the new defendants

would have been entitled to raise the same defenses as Williams, any attempt to amend the complaint would have been futile. See Keniston v Roberts, 717 F2d 1295, 1300-02 (9th Cir. 1983). Therefore, we conclude that the district court did not abuse its discretion by denying De Nardo's motion to amend his complaint.

De Nardo next contends that he was erroneously denied discovery. The objective test for immunity, however, is designed to be applied before discovery to avoid imposing the costs of discovery on potentially immune government officials. Harlow, 457 U.S. at 817-18. Thus, the district court did not err by denying the motions for discovery.

Finally, De Nardo challenges the district court's pretrial order and argues for Judge von der Heydt's

recusal. Since De Nardo did not raise these issues in the district court, we will not hear them on this appeal. See Guam v Okada, 694 F.2d 565, 570 n.8 (9th Cir. 1982).

.AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CRICUIT

FILED NOV. 29, 1984

DANIEL R. DE NARDO,

Plaintiff-Appellant,

No. 83-3827

vs.

THOMAS K. WILLIAMS, et al.,

Defendants-Appellees.

DANIEL R. DE NARDO,

Plaintiff-Appellant,

No. 83-3889

vs.

THOMAS K. WILLIAMS,
JOHN DOES, INDIVIDUALS ACTING
UNDER COLOR OF STATE LAW,
STATE OF ALASKA,
Defendants-Appellees.

MEMORANDUM

Before: BROWNING, Chief Judge, and WALLACE AND POOLE, Circuit Judges.

DeNardo, a former tax auditor for the State of Alaska Petroleum Revenue Division was fired in February, 1979 because he improperly used his position to obtain a copy of a death certificate. He filed

this action under 42 U.S.C. §1983 against Williams as the Director of the Petroleum Revenue Division, the State of Alaska, and unnamed defendants "acting under state law." De Nardo alleged that his constitutional rights under the First, Fourth, and Fourteenth Amendments were violated by his dismissal and by the removal of his personal effects from his locked desk drawer. DeNardo sought tompensatory damages from Alaska, compensatory and punitive and compensatory damages from Williams and from the unnamed defendants, and requested a jury trial. The district court issued several, nonfinal partial summary judgments, and eventually dismissed DeNardo's claim with prejudice.

The district court dismissed DeNardo's complaint for failure to comply with the court's order that he file an amended

complaint within ten days, and for failure to attend a preliminary pretrial conference. In this appeal, however, DeNardo does not contend that the district court erred by dismissinl his complaint. Thus, DeNardo is barred from seeking reversal of tme dismissal. AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO,

Plaintiff-Appellant,

vs.

THOMAS K. WILLIAMS, ET AL.,

Defendants-Appellees.

NOS. 83-3827
83-3889

ORDER

NOV. 4,1983

Before: GOODWIN, Circuit Judge

Appellees' motion of October 24, 1983 to consolidate these appeals is granted.

The briefs filed in appeal No. 83-3827 shall consitute the briefs in 83-3889. Appellant may file a reply brief within 14 days of the entry of this order. No other briefs smd.l be filed unless good cause is established.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DENARDO Plaintiff, vs THOMAS K. WILLIAMS and JOHN DOES, INDIVIDUALS ACTING UNDER STATE LAW, STATE OF ALASKA. Defendants.	)

No. A81-038 CIVIL FILED 6 JUNE, 1983.

NOTICE OF APPEAL

Notice is hereby given that Daniel R. DeNardo, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the summary judgment entered 7 April, 1983 and the pre-trial order of 8 April, 1983.

The court's decision and orders are void as being contrary to all the facts and all of the law. The court's decision is contrary to Art. 1 Sec. 8,

Amendments to the United States Constitution; and the rule making authority of the United States Supreme Court and the Congress of the United States.

DATED this 6th day of June, 1983.

Daniel R. DeNardo

cc: DeNardo
Jones

DANIEL R. DENARDO)
)
Plaintiff,)
)
vs)
)
THOMAS K. WILLIAMS and JOHN DOES,)
INDIVIDUALS ACTING UNDER STATE)
LAW, STATE OF ALASKA.)
)
Defendants.)

No. A81-038 CIVIL FILED 9 MAY, 1983.

NOTICE OF APPEAL

Notice is hereby given that Daniel R. DeNardo the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of dismissal entered 6 May, 1983.

The court's order is void as being contrary to all the facts and all the law. The court's decision is a violation of Art. 1 sec. 8, Art. 1 sec. 10, and the First, Fourth, Fifth, Seventh, Ninth, and Fourteeneth

Art. 1 Sec. 10, and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

DATED this 9th day of May, 1983.

Daniel R. DeNardo

cc: DeNardo

Jones